

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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:   
GUZMAN, : 09-CV-9323  
:   
Plaintiff, : April 6, 2011  
:   
v. : 500 Pearl Street  
: New York, New York  
NEWS CORPORATION, et al.,. :   
:   
Defendants. :   
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TRANSCRIPT OF CIVIL CAUSE FOR TELEPHONE DISCOVERY CONFERENCE  
BEFORE THE HONORABLE RONALD L. ELLIS  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff: KENNETH THOMPSON, ESQ.

For the Defendants: MARK LERNER, ESQ.  
BLYTHE LOVINGER, ESQ.

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1 THE CLERK: Good afternoon. This is Judge Ellis.  
2 Could you give your appearances?

3 MR. LERNER: Sure. For the defendants, all  
4 defendants, this is Mark Lerner and I'm here with Blythe  
5 Lovinger and Garret Kennedy.

6 MR. THOMPSON: Good afternoon, Your Honor. Ken  
7 Thompson and [inaudible] on behalf of the plaintiffs.

8 THE COURT: This is a conference in the Guzman and  
9 Fenner cases. Guzman is 09-CV-9323 and Fenner is 09-CV-9832  
10 and both cases involve the News Corporation. Because of the  
11 issues that may impact on one case or the other they are  
12 together for purposes of the discovery that is before the  
13 court.

14 The issues that I have include an application by  
15 the plaintiffs to stay discovery until Judge Jones rules on  
16 the motions that are before her and a motion -- well, I guess  
17 it's not really a motion but at least an application by  
18 defendants for the plaintiff's deposition not only to go  
19 forward but to consist of at least two days of deposition. I  
20 say at least because sometimes there could be an application  
21 even after the deposition has started.

22 Is there anything else that the parties -- and  
23 that's what I gleam from the letters that the parties have  
24 submitted to me.

25 MR. LERNER: No, Judge, I think you've summed it

1 from our perspective on the defendant's side.

2 MR. THOMPSON: Your Honor, this is Kenneth Thompson.  
3 With respect to our request it's not really for a stay of all  
4 discovery. It's to hold off on the depositions until Judge  
5 Jones rules on the pending motions. We would like to still  
6 be able to engage in discovery in terms of the document  
7 production.

8 THE COURT: Is that your understanding, Mr. Lerner?

9 MR. LERNER: Yes. I believe -- it's my  
10 understanding that Mr. Thompson has accurately characterized  
11 his own application, yes.

12 THE COURT: To begin with there is a development  
13 which I have not fully taken into account and I don't know  
14 that it affects the party's positions but Judge Jones has  
15 determined that the motion having to do with the striking of  
16 portions of the complaint will be referred to me. So I guess  
17 the one thing that I can at least gauge is when the -- when  
18 that motion might be decided.

19 The only other question I had concerned a  
20 difference of opinion the parties seem to have concerning  
21 what the defendant's position is with regard to responding to  
22 questions having to do with the chimpanzee cartoon and  
23 whether or not the [inaudible] processes and any of what the  
24 Post considers First Amendment protected conduct.

25 Mr. Thompson indicates that there was -- it was

1 stated clearly that there would not be any responses or to be  
2 directed not to answer those questions and I believe that Mr.  
3 Lerner's position seemed to be less definitive on what was --  
4 what would or would not be answered. I didn't mean less  
5 definitive to be pejorative; just that it was not an all or  
6 nothing proposition but that there might be some questions in  
7 those areas almost -- not quite question by question but not  
8 as dark as Mr. Thompson presented it.

9 I don't suppose you've had any conversations since  
10 the letters the two of you sent as to what --

11 MR. THOMPSON: No, Your Honor.

12 THE COURT: Since I guess the last letter I got was  
13 -- I think the last communication was from Mr. Thompson. Mr.  
14 Lerner, why don't you tell me what your position is with  
15 respect to answering such questions or your witnesses  
16 answering such questions.

17 MR. LERNER: Okay, thank you. Our position is that  
18 there is an editorial privilege that would protect the Post  
19 from answering certain questions that when it comes to the  
20 topics relating specifically to the cartoon that there are  
21 questions that impinge and there are questions that do not.  
22 As Your Honor correctly characterized our position it's not  
23 all or nothing. What we would -- what we believe is  
24 appropriate for inquiry, and this in part derives from the  
25 prior ruling on the motion to dismiss, is that any questions

1 relating to how the Post responded to the employee's -- the  
2 employee's responses to the cartoon what measures the Post  
3 took with respect to its own employees to address those  
4 concerns, what statements might have made to the employees  
5 who raised concerns and specifically to Ms. Guzman and what  
6 she might have overheard, et cetera. I think there's some  
7 allegations regarding that.

8           So if it relates to Post's response as it affected  
9 Ms. Guzman we believe those -- that area of inquiry is  
10 appropriate. We don't think that that's a -- we're not  
11 intending to broaden our position with respect to other  
12 employee's complaints which we've discussed in another  
13 context but really just addressing the fact that things that  
14 came out -- things that happened in the aftermath of the  
15 publication [inaudible] cartoon we do not believe are  
16 covered.

17           Where we would object is to questions relating to  
18 the decision to publish the cartoon, decisions that --  
19 conversations or considerations that might have been  
20 undertaken by the individual or individuals that made the  
21 decision to publish the cartoon that evaluated it for its own  
22 editorial value or content as well as -- and then the same  
23 sort of category of information as it would reflect to -- as  
24 it would pertain to other editorial decisions. The complaint  
25 mentions other headlines. It's not limited just to the

1 stimulus cartoon but it refers to some other headlines that  
2 were deemed offensive.

3           And then finally we believe that the editorial  
4 process privilege would apply to the meetings and discussions  
5 of the editors regarding stories of what to publish, what is  
6 significant about them, what their impact would be, and the  
7 reason that that comes up is because there are allegations  
8 made by Ms. Guzman about statements made during [inaudible]  
9 discussions.

10           So those are the areas that I think are the  
11 front -- the primary areas where we believe that process  
12 would apply and we believe that the proper procedure -- I  
13 think it would be very difficult for Your Honor to make a  
14 ruling on whether or not the Post's objection to those  
15 questions is appropriate before they're asked before the  
16 context in the deposition is seen and before Your Honor can  
17 actually see the questions. So our view on the process would  
18 that the deposition would proceed, that we would object where  
19 we believe appropriate and as well as instruct our witness  
20 not to answer a question if we believe that the process --  
21 the privilege is appropriately applied there and then those  
22 objections to the extent contested could be brought before  
23 the court.

24           THE COURT: Does that rule out some limiting ruling  
25 by the court prior to the taking of a deposition? I mean I

1 realize that you're saying that -- even if there's a prior  
2 restriction imposed by the court it might not be covered  
3 until you started asking questions whether or not you ran  
4 afoul [inaudible] but are you suggesting that there shouldn't  
5 be a ruling by the court for general guidance so that it  
6 would minimize the possibility of an instruction not to  
7 answer?

8 MR. LERNER: I think that a ruling in that nature  
9 would be helpful at this point in time and I think we'll  
10 still end up bringing some issue before the court as to  
11 whether or not a particular question either fell in -- within  
12 or without the ruling or isn't covered by it. But I think it  
13 would be very helpful to have court guidance at this time on  
14 the topic.

15 THE COURT: I know what Mr. Thompson says about the  
16 difficulties of going forward with depositions. What  
17 prejudice would there be to you in the stay?

18 MR. LERNER: I'm sorry, Judge. I lost you for the  
19 last few words of that.

20 THE COURT: I said what -- what prejudice would  
21 there be to you if a stay were granted?

22 MR. LERNER: Well, I think there -- Your Honor, I  
23 think there is -- there has been -- quite a bit of time has  
24 gone by and the prejudice is really the general prejudice  
25 that comes from the passage of time in these cases. And we

1 tend to associate prejudice along these lines with plaintiffs  
2 as in the idea of justice delayed is justice denied. But in  
3 this -- my experience in this case and in other  
4 discrimination employment cases like this time really does  
5 work against the defendants. It works against the defendants  
6 because often times witnesses tend to move on. They move  
7 away. Their memories fade. These are incidents that often  
8 times are -- may not have had great significance at the time  
9 that they occurred but in the context of a lawsuit they take  
10 on significance. So the freshness of memory is important and  
11 for that -- that's all a big factor.

12           The other factor is that these are -- these were  
13 well publicized allegations against the Post and we do feel  
14 that the justice delayed is justice denied sort of notion  
15 really does apply to the Post here. We're eager to have a  
16 resolution of the case. So we believe there's prejudice in  
17 those respects.

18           One of the -- I would just add that one of the  
19 employees, one of the plaintiffs is a current employee at the  
20 Post. So there's -- she's named two of her supervisors as  
21 defendants. So there is -- there's certainly an interest in  
22 having the dispute resolved from our internal, you know,  
23 organizational standpoint for the New York Post.

24           THE COURT: I understand the witnesses memory may  
25 fade although I generally assume that with respect to the



1 parties own witnesses they have a sense of what those  
2 witnesses are going to testify about and they probably  
3 already talked to them. So this would probably apply to  
4 third party witnesses and I'm not so sure there are third  
5 party witnesses in this case. To the extent that memories  
6 might fade for the plaintiff's witnesses I think that's  
7 probably going to fall on Mr. Thompson.

8 But the other question I have for you is you asked  
9 for two days of depositions and you were -- you alluded to  
10 voluminous amended complaint and I'm not exactly sure what  
11 voluminous refers to and I'm not sure what the nature of the  
12 complaint will be after the court's review of the motion  
13 because I know some parts of the amended complaint do talk  
14 about some of the things which you've asked to have stricken.  
15 But how long is the complaint?

16 MR. LERNER: Well, the complaint contained 111  
17 paragraphs of factual allegations before the start of the  
18 planning of the first cause of action. So that's the general  
19 range. In pages I think it was that's probably the range of  
20 twenty or somewhere between twenty and thirty pages up to  
21 that point and then additional allegations on the causes of  
22 actions.

23 The topics -- I'm -- I want to talk about how broad  
24 the things that need to be covered are but I also don't want  
25 to provide my outline in the presence of my adversary. So I

1 want to speak with some restraint but the scope of discovery  
2 is -- of this deposition is going to include the many topics,  
3 many incidents. She was at the Post, Ms. Guzman was at the  
4 Post for six or seven years and one of the issues in the case  
5 or big issue in the case is the reason for her termination  
6 and the fact that -- so there are -- the Post's reason has to  
7 do with the business performance of the section that she  
8 worked on. That's a significant topic. There are also --  
9 there are her allegation that she could have and was doing  
10 other jobs. There are allegations regarding her  
11 conversations with many people. There are many areas of  
12 inquiry regarding her conduct at the Post that we'd like to  
13 go into. As I said, many incidents.

14 We do not foresee -- just to point out to the  
15 court, this is not an application we're making lightly. We  
16 do not make this application with respect to the plaintiff's  
17 deposition in the Fenner and Livingston matter. We believe  
18 that those -- we can conduct those depositions in the one day  
19 that the federal rules default prescribe as the default. But  
20 the federal rules do say that one day is just a default and  
21 that where there's good cause that additional time can be  
22 ordered.

23 I know that sometimes there's an inclination to say  
24 see how far you get in seven hours and I think in a way  
25 that's telling the lawyer complete your deposition in seven

1 hours because the lawyer doesn't know whether or not there's  
2 going to be more time allowed. So our view -- I don't know  
3 that we would necessarily take two full days but -- and we  
4 would proceed responsibly but I do think that a one day  
5 deposition on the number of allegations of incidents and  
6 topics here for this particular plaintiff is a reasonable  
7 request.

8 THE COURT: Thank you. Mr. Thompson, did you want to  
9 respond to anything that Mr. Lerner said?

10 MR. THOMPSON: Yes. Thank you very much, Your  
11 Honor. With respect to whether there would be prejudice to  
12 the defendants by staying depositions, there would be  
13 absolutely no prejudice to the defendants.

14 With respect to wanting to get this case moving  
15 along, what the defendants have done in this case is kind of  
16 important. They filed a motion to dismiss in December of  
17 2009. Judge Jones ruled on that motion in September 2010 and  
18 we agreed -- they consented to the filing of the amended  
19 complaint with the Title 7 causes of action once we received  
20 the plaintiff's right to sue letter. They wrote a letter  
21 that Judge Jones telling her that they consented to the  
22 filing of these complaints. We filed the amended complaints  
23 and instead of filing answers they turned around and they  
24 filed a second pre-answer motion. The current motion to  
25 strike --

1 THE COURT: Mr. Thompson, I think I have that theme  
2 already in your letter.

3 MR. THOMPSON: Okay. The point I'm making, Your  
4 Honor, is this. In terms of taking these depositions what we  
5 want to do is we want to make sure that our clients are not  
6 going to be prejudiced. Our clients would be prejudiced if  
7 the depositions were allowed to go forward not only because  
8 although I understand that the -- the court has the motion to  
9 strike before it but there's also the motion for  
10 reconsideration. If Judge Jones agrees that the plaintiffs  
11 are entitled to the complaints of other employees we have a  
12 right to sit down with our clients and go over any other  
13 complaints that may be produced by the defendants before  
14 their depositions because what could happen here is our  
15 clients can be deposed about all of their knowledge of  
16 discrimination within the workplace of the New York Post and  
17 News Corp. and they can testify to the best of their  
18 recollection in terms of what they recall and [inaudible]  
19 Judge Jones agrees and grants the motion for reconsideration  
20 and were given additional complaints and we sit down with  
21 them and it refreshes their recollection and then I  
22 [inaudible] examples opposing counsel, the defense will be  
23 able to stand up and impeach them with their deposition  
24 testimony.

25 What we want to do is we want to be able to take

1 depositions in a way in which they will not be disrupted and  
2 if the court is going to now handle the motion to strike and  
3 Judge Jones is going to handle the motion for reconsideration  
4 we ask to be allowed to continue to engage in document  
5 production so we'll be moving this case along. We have a  
6 couple of other disputes we need to resolve and we've been  
7 trying to resolve regarding redacted documents. We served a  
8 new set of document requests. So it's not like the case is  
9 not moving at all.

10 We would only ask that the depositions be stayed  
11 until the motion to strike, the motions to strike are  
12 resolved and the motion for reconsideration.

13 In addition, with respect to the request for two  
14 days to depose Ms. Guzman, I point out in a letter that  
15 defendants have maintained to Your Honor that there are only  
16 five incidents that she claims that she complains about  
17 during her six years of employment. Now they claim that  
18 there's so many incidents that they need two days. That's  
19 apparently un -- it's inconsistent to present to the court an  
20 argument that oh, she has nothing here, Your Honor, that's  
21 why she really doesn't have, she can't make out a hostile  
22 work environment claim, her allegations are so sparse but  
23 then turn around and say we need two days because the  
24 complaint is so voluminous.

25 We would ask that they be restricted to the seven

1 hours under the rules because this is not a complicated case.  
2 This is not a case where they have to bring Ms. Guzman in for  
3 two days of depositions. That would be prejudicial to her.  
4 They can get through their depositions of the incidents that  
5 we want to talk to about in a regular deposition.

6 THE COURT: Thank you, Counsel. On balance I think  
7 it would be appropriate frankly for me to get the papers on  
8 the motion having to do with striking a portion of the  
9 complaint in order for me to make a more informed judgment on  
10 the issues that have been raised including what it's going to  
11 take to do the deposition of the plaintiff.

12 With respect to the question of the stay, what I'll  
13 do is I will stay depositions for a period of four weeks and  
14 reevaluate at the end of those four weeks. Presumably I will  
15 have -- I'll be deeply into the motion and I'll have a better  
16 sense of what's happening with Judge Jones on the other  
17 motion.

18 I don't find that the -- any prejudice that might  
19 be occasioned by a stay of that length at this time would be  
20 prejudicial and frankly I don't think it's going to impact  
21 that much on the ultimate end of discovery in the cases that  
22 are before me. I anticipate that there's going to be a  
23 number of things that are going to be much more challenging  
24 in terms of what impact they're going to have on bringing  
25 this case to trial readiness.

1           So we will have a formal stay which will be in  
2 effect until -- let me look at my calendar.

3                           [Pause in proceedings.]

4           THE COURT: May 6<sup>th</sup>. We'll make it May 6<sup>th</sup> which is  
5 the Friday, the first Friday of May. Before that time either  
6 on my own or one of you will remind me, we will talk about  
7 whether or not it's time to proceed with the deposition.  
8 During that period of time I expect the parties to have  
9 ongoing document discovery, and also with respect to the  
10 issues that were raised concerning the scope of any  
11 depositions of Post employees I want to make sure that you  
12 refine your position as to what kinds of questions can and  
13 cannot be answered.

14           Other than that for now we will be adjourned.  
15 Thank you.

16           MR. THOMPSON: Thank you, Your Honor.

17           MR. LERNER: Thank you, Your Honor.

18                           \* \* \* \* \*

1 I certify that the foregoing is a court transcript from  
2 an electronic sound recording of the proceedings in the  
3 above-entitled matter.

4  
5 \_\_\_\_\_  
6 Shari Riemer

7 Dated: September 11, 2011  
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